Mortgagees would then be in a position to rely on the terms of their mortgage instrument and claim the insurance moneys for themselves. This outcome is both inconsistent with the duty of the Sheriff to effect insurance on a vessel arrested upon lodgement of the commission of appraisement and sale on behalf of all parties interested in the *res* as shall be determined judicially and, in this case, is also unjust and unfair to Singmarine whose possessory lien would have been whittled down because of the casualty.

In the circumstances, I would dismiss the Mortgagees' application with costs.

Order accordingly.

Solicitors: *Haridass Ho & Partners; Tang & Co.; Rodyk & Davidson.*

ONG & COMPANY PTE. LTD. v. CARL Y. L. CHOW

[A.C.J. (Chan Sek Keong J.C.) May 28, 1987]

[Singapore – Civil Suit No. 3786 of 1986]

Practice and Procedure – Writ of Summons – Service out of jurisdiction – Non-compliance with R.S.C. 1970 – Effect of – Meaning of "may" in R.S.C. 1970, O.11 rr.5 & 6.

On June 20, 1986, the plaintiffs obtained leave to issue a Writ of Summons against the defendant and to serve notice of the said writ on him at an address in Kuala Lumpur, Malaysia. The Notice of the Writ was served on the defendant personally on July 30, 1986 by a process server employed by a firm of solicitors practising in Kuala Lumpur.

On September 2, 1986, the defendant applied to set aside the service of the Notice of the Writ for non-compliance with Order 11 rule 5 and/or Order 11 rule 6 of the Rules of the Supreme Court 1970. On January 30, 1987, the Senior Assistant Registrar made an order setting aside the said service. The plaintiff appealed against the said Order.

Held, dismissing the appeal: (1) rule 5(1) does not expressly say that such personal service may be effected by a private arrangement between the plaintiff and his agent in the country where service is to be effected;

(2) the service of a writ is an exercise in judicial power. The judicial power of a State can only be exercised within the territorial limits of the State over which the courts have jurisdiction;

(3) rule 6(2) of Order 11 of the 1970 Rules provides for service (a) through the government of that country where that government is willing to effect service; or (b) through a Singapore consular authority in that country, except where service through such an authority is contrary to the law of that country;

(4) the expression "may" as used in Order 11 rule 5(8) and rule 6(2) connotes permission and not discretion. Without these rules, service of process outside the jurisdiction would not be possible;

(5) by effecting services of the Notice of the Writ without complying with rule 5(8) or rule 6(2) of Order 11, the plaintiff had in fact disregarded the legal basis upon which the judicial power in Singapore may be exercised in Malaysia. That must render the purported service a nullity.

Cases referred to:

(1) *Re Busfield* (1886) 32 Ch. D. 123.
(2) *Afro Continental Nigeria Ltd.* v. *Meridian Shipping Co. S.A.* (*The "Vrontados"*) [1982] 2 Lloyd's Rep. 241.

APPEAL FROM REGISTRAR.

Yap Shao Sin for the plaintiffs/appellants.

Goh Kok Leong for the defendant/respondent.

Cur. Adv. Vult.

Chan Sek Keong J.C.: On June 20, 1986, the plaintiffs obtained leave to issue a Writ of Summons against the defendant and to serve notice of the said writ on him at an address in Kuala Lumpur, Malaysia. The Notice of the Writ was served on the defendant personally on July 30, 1986, by a process server employed by a firm of solicitors practising in Kuala Lumpur. According to an affidavit filed by an advocate and solicitor practising in Kuala Lumpur, this method of service was permitted by the rules of the procedure applicable in Malaysia.

On September 2, 1986, the defendant applied to set aside the service of the Notice of the Writ for non-compliance with Order 11 rule 5 and/or Order 11 rule 6 of the Rules of the Supreme Court 1970 ("the 1970 Rules"). On January 30, 1987, the Senior Assistant Registrar made an order setting aside the said service. The plaintiff has now appealed against this order.

The plaintiffs' contention is that Order 11 Rule 5(1) and (2) of the 1970 Rules permit them to effect service in the manner they have done which was in accordance with the law of Malaysia. The

defendant's contention is that service out of the jurisdiction must be effected under Order 11 rule 5(8), rule 6(2) or Order 62 rule 5 and under no other rules.

The relevant Rules read as follows:

"O.11 r.5.–(1) Subject to the following provisions of this Rule, Order 10, Rule 1, and Order 62, Rule 5, shall apply in relation to the service of a notice of a writ notwithstanding that the notice is to be served out of the jurisdiction."

(2) Nothing in this Rule or in any order or direction of the Court made by virtue of it shall authorise or require the doing of anything in a country in which service is to be effected which is contrary to the law of that country.

. . . .

(8) Where the defendant is in Malaysia or Brunei, the notice of a writ may be sent by post or otherwise by the Registrar to the Magistrate, Registrar, or other appropriate officer of any Court exercising civil jurisdiction in the area in which the person to be served is said to be or to be carrying on business for service on the defendant, and if it is returned with an indorsement of service and with an affidavit of such service, it shall be deemed to have been duly served.

6. – (2) Where in accordance with these Rules notice of a writ is to be served on a defendant in any country with respect to which there does not subsist a Civil Procedure Convention providing for service in that country of process of the High Court, the notice may be served –

(a) through the Government of that country, where that Government is willing to effect service; or

(b) through a Singapore consular authority in that country, except where service through such an authority is contrary to the law of that country.

"0.62 r. 5.–(1) If, in the case of any document which by virtue of any provision of these Rules is required to be served personally on any person, it appears to the Court that it is impracticable for any reason to serve that document personally on that person, the Court may make an order in Form 135 for substituted service of that document.

(2) . . . .

(3) Substituted service of a document, in relation to which an order is made under this Rule, is effected by taking such steps as the Court may direct to bring the document to the notice of the person to be served."

It is to be noted that rule 5(8) and rule 6(2) of Order 11 provide that service outside the jurisdiction *may* be effected in the manner set out herein. Counsel for the plaintiffs contended that the expression "may" in both Rules give litigants a choice of procedure without affecting the plaintiffs' right to serve the Notice of the Writ in accordance with any other applicable rule and that rule 5(1) and (2) of Order 11 is such an applicable rule.

I do not accept this argument. Rule 5(1) and (2) of Order 11 provide that service of a notice of writ is by personal service provided it is not contrary to the law of the country where service is to be effected. Rule 5(1) does not expressly say that such personal service may be effected by a private arrangement between the plaintiff and his agent in the country where service is to be effected. The service of a writ is an exercise in judicial power. The judicial power of a state can only be exercised within the territorial limits of the state over which the courts have jurisdiction. As Cotton L.J. said in *Re Busfield*[1]

"Courts exercise jurisdiction only over persons who are within the territorial limits of their jurisdiction . . . A court has no power to exercise jurisdiction over anyone beyond its limits."

In other words, the judicial power of one State cannot be extended or exercised in another independent State except with the consent of that State. The reason is that it encroaches upon the sovereign rights of the other State. As was said by Lord Denning in *Afro Continental Nigeria Ltd.* v. *Meridian Shipping Co S.A. (The "Vrontados")*[2]:

". . . . . service of a writ out of the jurisdiction is an exercise of sovereignty within the country in which service is effected. It can only be done with the consent of that country. That is why our rules provide for service through the judicial authorities of that country or through a British Consular authority in that country, see R.S.C. O.11, rr. 5(5) and (6)."

The relevant rules in Order 11 of the 1970 Rules differ slightly from the English Order 11, but provision is made in rule 6(2) for service (i) through the government of that country where that government is willing to effect service; or (ii) through a Singapore consular authority in that country, except where service through such an authority in contrary to the law of that country. Order 11 rule 5(8) in fact sets out the agreements of two foreign governments, *viz.* Malaysia and Brunei to allow Singapore parties to effect service of process in the manner set out therein. I do not think it is an alternative mode of service outside the jurisdiction. The reason why this subrule should appear before rule 6(2) was due to the adoption of the 1970 Rules whereas rule 5(8) was a re-enactment of the former Order 11 rule 8 of the Rules of the High Court 1934.

Against this background, it is therefore plain that the expression "may" as used in Order 11 rule 5(8) and rule 6(2) connotes permission and not discretion. Without these rules, service of process outside the jurisdiction would not be possible.

Accordingly, the service of the Notice of the Writ by means of a court process server employed by a solicitors firm in Kuala Lumpur was not an authorised method of service under the 1970 Rules.

The next submission of counsel for the plaintiff is that if the service was wrong it was merely an irregularity which can be amended under Order 2 rule 2 of the 1970 Rules on the ground that the defendant, having been actually served with the Notice of the Writ and entered appearance, has not suffered any prejudice. There is no substance in this argument. By effecting service of the Notice of the Writ without complying with rule 5(8) or rule 6(2) of Order 11, the plaintiff has in fact disregarded the legal basis upon which the judicial power in Singapore may be exercised in Malaysia. That must render the purported service a nullity.

For these reasons, this appeal is dismissed with costs.

Appeal dismissed.

Solicitors: *Advani Hoo Morris & Kumar; Ang & Partners.*

JAYA KUMAR v. SUBRAMANIAM MOHANA KRISHNAN & ANOR.

[A.C.J. (Thean J.) June 3, 1987]

[Singapore – D.C. Suit No. 12000 of 1986]

Practice and Procedure – Summary judgment application – Defendants claimed plaintiff in default for failing to register business – Whether plaintiff's application allowed – Subordinate Courts Rules, 1986, O.14 – Business Registration Act (Cap. 32, 1985 Ed.) s. 17(1).

Contract – Claim for sum owed – Failure of plaintiff to register business – Whether plaintiff disabled from enforcing his rights under Deed – Business Registration Act (Cap. 32, 1985 Ed.), s. 17(1).

This was an appeal by the plaintiff against the decision of the Deputy Registrar of the Subordinate Courts in which, upon an application by the plaintiff for summary judgment against the first defendant, the Deputy Registrar granted the defendant conditional leave to defend the action.

The plaintiff claimed against the first defendant under a Deed dated July 8, 1986 made between the second defendant, the first defendant and the plaintiff. It was recited in the Deed that (1) the plaintiff had been carrying on the business of the basement lounge at Indian Association" since June 1, 1985; (ii) the plaintiff had transferred the said business to the second defendant on December 16, 1985; (iii) in consideration of the transfer, the second defendant had agreed to pay to the plaintiff a sum of $24,000 of which a balance sum of $11,250 was then still owing and unpaid by the second defendant and (iv) the second defendant had transferred the said business to the first defendant on April 2, 1986.

The first defendant did not deny that he had failed to pay to the plaintiff the sum of $11,250 or any part thereof.

The first defendant contended, *inter alia*, that the plaintiff did not at the time when he carried on the business register his business under the Business Registration Act (Cap. 32, 1985 Ed.) ("the said Act") and therefore he could not under section 17(1) of the said Act enforce his rights under the Deed against the first defendant.

Held, allowing the appeal: (1) where the issue raised was one of law and it was clear-cut and could be decided upon, then the judge hearing it, or, upon an appeal, the appellate court, should decide on it rather than to let it go to trial;

(2) section 17(1) of the said Act did not apply to the contract as the contract contained in the Deed was not made or entered into at any time while the plaintiff was in default;

(3) section 17(1) of the Business Registration Act did not disable the plaintiff from enforcing his rights under the Deed against the first defendant. The first defendant therefore had no defence to the claim.

Cases referred to:

(1) *Verrall* v. *Great Yarmouth Borough Council* [1981] Q.B. 202, 218.
(2) *European Asian Bank A.G.* v. *Punjab & Sind Bank (No. 2)* [1983] 1 W.L.R. 642, 654.
(3) *Re Debtor (No. 5 of 1919)* (1919) 89 L.J.K.B. 40.

APPEAL FROM REGISTRAR.

Gopalan Nair for the plaintiff.

M.P. Kanisan for the first defendant.

Cur. Adv. Vult.

Thean J.: This is an appeal by the plaintiff against the decision of the Deputy Registrar of the Subordinate Courts in which, upon an application by the plaintiff under Order 14 of the Subordinate Courts Rules, 1986 for summary judgment against the 1st defendant, the Deputy Registrar gave unconditional leave to the latter to defend this action. The action was brought by the plaintiff